IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Civil Misc. Suit No. 3194 of 2001, decided on 17/9/2003

Basant Kumar Sharma (since deceased)------ Petitioners

Ravinder Kumar Sharma

and others

Vs.

Rent Control & Eviction Officer, Dehradun----Respondents

and another.

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date 17/9/03

Initials of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil Misc. Writ Petition No. 3194 of 2001
(Old No. 15766/1987)

Civil Side

Basant Kumar Sharma (since deceased)
1. Ravinder Kumar Sharma
2. Yogendra Kumar Sharma
3. Smt. Vineeta Sharma
4. Ms. Savita Sharma …… Petitioners

Versus

1. The Rent Control & Eviction Officer, Dehradun
2. Shri Dham Singh, Sub Inspector of Police C/o Kotwali, Dehradun …… Respondents

Sri V. K. Kohli, Advocate for the petitioners
Sri Alok Singh, Advocate & Standing counsel for the respondents

Hon'ble Rajesh Tandon J:

By the present writ petition Sri Basant Kumar Sharma father of the petitioner No.1 to 3 and husband of petitioner no.4 has challenged the order dated 11.8.1987 passed by the Rent Control and Eviction Officer, Dehradun. During the pendency of writ petition, Sri Basant Kumar Sharma expired and now the petitioners have been substituted in his place.

The brief facts giving rise to the present writ petition are that the property namely 11/171 Nari Shilp Mandir Marg, Dehradun is a double storey building. The ground floor consists of three shops. One shop is in occupation of the petitioners,

another is in occupation of landlady and the third one is a Ayurvedic Shop. There are three rooms which are in occupation of the petitioners and they are interconnected. The building in dispute, therefore, alleged to be non-residential building. According to the petitioner late Sri Basant Kumar Sharma, the premises in dispute was occupied for business purpose and earlier it was used by their grand father for running an engineering workshop and later on the petitioner's grand mother continued the said business. The business was run by them in the name of Mahendra Engineering Co. and store part of rig in manufactured and supplied to the Oil and Natural Gas Commission. It was stated that during the lifetime of the mother of Sri Basant Kumar Sharma in 1964 the petitioner became a partner in 1964. In 1983 the mother of Basant Kumar Sharma died and as such the premises is in continuous occupation for business purposes.

In paragraph 4 of the writ petition it was stated that earlier an application under section 21 (1) of U.P. Act No. XIII of 1972 was filed against the mother of late Sri Basant Kumar Sharma. The application was allowed on 30.3.1977 by the Prescribed Authority but in appeal on 1.11.1977 the order was set aside. Against that a Writ No.1497 of 1978 was filed but the same was dismissed on 11.12.1979. Aggrieved by the same S.L.P. No.4420 of 1980 was filed by the landlady Dr. Pritam Kaur before the Hon'ble Supreme Court and the same is pending.

It was stated that since the predecessor of the petitioner was in occupation of the premises is in the nature of non-residential premises and as such vacancy proceedings are wholly

illegal and has been declared without complying the provisions of Rule 8 of U.P. Act No. 13 of 1972. The Rent Control and Eviction Officer vide his order-dated 11.8.87 has declared the premises as vacant. The present writ petition has been filed against the order declaring vacancy.

Heard the learned counsel for the petitioner as well as for the respondent at great length.

A bare perusal of the application for allotment shows that the proceedings for vacancy were started on the application filed by Dharam Singh for allotment of premises on 7.7.1985. On the said application Rent Control Inspector was directed to report. The Inspector has inspected the premises subsequently 23.10.1986. The report of the Inspector is quoted below:

निरीक्षण के समय दुकान खुली पाई गयी। दुकान के पीछे की ओर सभूतल पर चार कमरे, किचन जैसा कमरा, जिसमें पानी विखरा पडा था काई जीम थी बाथरूम एवं कच्ची लैट्रीन एवं एक कच्चा कमरा जिसमें बावलर आदि रखे थे। प्रश्नगत कमरों में बिजली के सामान रखने का स्टोर बनाया हुआ है। पिछले बरामदे में वर्कसाप खुला पाया गया जिसमें पंखे आदि मरम्मत हेतु खुले पाये गये।

पहले इस भवन में प्रभावती एवं श्री बसन्त लाल का कब्जा था तीन साल पूर्व श्रीमती प्रभावती का निधन हो चुका है तब से श्री बसन्त लाल मै0 महेन्द्रा इन्जीनियरिंग क0 11 चकराता रोड के नाम से इस दुकान में व्यापार कर रहे हैं और वर्तमान में भवन का कब्जा उन्ही के पास है।

As will appear from the report that business of Mahendra Engineering Co. was being carried on in the premises in dispute.

The vacancy was sought to be declared on the ground that Sri Basant Kumar Sharma (deceased) has constructed a house at 19/3 Rajpur Road, Dehradun. The occupant has filed objections and has stated that no notice as required under Rule 8 (2) of U.P.

Act 13 of 1972 was given to the petitioner as required by the aforesaid rule. It was stated in his objections that since 1933, father of the petitioner (father of the deceased Basant Kumar Sharma) was doing business in the name of Mahendra Engineering Co. and for that purpose accommodation was taken on rent. The business of Engineering workshop was being run in the premises under tenancy. It was further stated that there is no separate portion is being used as residential and there is single tenancy in their possession for non residential purposes. The back portion of the premises is being used for preparation of tea etc. as in the workshop he used to work up to 12 at night due to disturbance in electricity. The work of the petitioners is for fabrication of rig for Govt. supply.

It has come on the record that earlier proceedings under section 21 (1)(a) of U.P. Act No. 13 of 1972 there has been clear stand of the previous landlady that the accommodation in question is non-residential. According to the applicant the premises at 19/1 Rajpur Road has been constructed for residential purposes.Along with the objections the affidavit was also also filed and it was stated that the premises was taken on rent for the purpose of business. Paragraph 8 of his petition is quoted below:

यह कि विवादित सम्पति सं0 11 रामपुर मण्डी रोड नया नम्बर 171 नारी शिल्प मन्दिर मार्ग देहरादून का एक भाग है जिसका विवरण शपथकर्ता ने अपनी आपत्ति दिनांक 3.7.86 में दिया है विवादित सम्पति सन 1933 में आपत्तिकर्ता के पिता श्री फतेह चन्द्र ने व्यवसायिक एवं आवासीय उददेश्य के लिये किराये पर लिया था जिसमें व्यवसायिक उदेश्य मुख्य डामिनेन्द परपज विजनिस था। सन् 1933 से ही उक्त सम्पति में शपथकर्ता के पिता अपनी इन्जीनियरिंग वर्कशाप चलाते रहे व उसी में रहते रहे।

Along with the affidavit the predecessor of the petitioner has also filed the copy of S.L.P. and there has been an admission on the part of the previous landlady that the building is a non-residential. Relevant paragraphs are quoted below:

68. "That the High Court erred in coming to the conclusion that clause (ii) to the third proviso of section 21 of the Act bar's the application of the petitioner landlord. The building in which the disputed premises are situated is occupied mainly for business purposes and 5/7th of it is being used for business purposes only. It may now be pertinent to mention here what said in clause (II) to the third proviso to section 21 of the Act.

69. In the present case there cannot be any conflict of petitioner requiring residential building for business purpose. Because the nature of the accommodation in occupation of the tenant cannot mean residential building as the building in which the premises situated is mainly occupied for business purposes so there does not appear to be any element of changing the nature of the accommodation as envisaged by the legislature in clause (ii) of the third Proviso to section 21 of the Act.

71. *That the High Court also failed to appreciate that the shop which was in occupation of the tenant was the dominant purpose for which the tenant had been occupying the premises in dispute. The back portion of the shop even if it was used for living purpose cannot be termed as "residential building" and the shop be only termed as business premises. What the High Court failed to notice was that the whole of the premises in occupation of the tenant was for the purposes of business. Therefore, the*

present case is not covered by clause (ii) of the third proviso to section 21 of the Act."

On behalf of the petitioners there was an affidavit of Sri Om Prakash Agrawal who has stated that the premises is being used for business of Mehendra Engineering Co.

I have also perused the Income Tax assessment of Mehendra Engineer Company relating to 1966 to 1987 as well as other documents relating to Mahendra Engineering Co. photographs were also filed for running Engineering Workshop in the premises in dispute.

There is a counter affidavit or Sri Manoj Poddar on the record, it has stated that the premises was let out for residential as well as non-residential purposes. No documentary evidence was annexed along with the counter affidavit in order to prove that the nature of the user is residential. The findings of the Rent Control and Eviction Officer, therefore is based on no material on record when he has come to the conclusion that the premises no. 11/171, Nari Shilp Road, is vacant.

During the pendency of the writ petition an application was filed on behalf of Manoj Podar where he has stated that he has purchased property on 26.3.99 by way of sale deed executed by legal heirs of Dr. Preetam Kaur. The application was allowed vide order dated 29.3.2000. The aforesaid application was filed on 5th May 1999.

In the mean time Basant Kumar Sharma had also expired on 9.1.2003 leaving behind his sons Ravinder Kumar Sharma,

Yogendra Kumar Sharma, Smt. Vineeta Sharma and Savita Sharma.

The sole question which has to be decided in the present writ petition is as to whether premises in question is being used by the petitioners for residential purpose or for non-residential purpose so as to attract sub section (3) of Section 12 of the Act.

From the facts on record it is established that on inspection at the initial stage the premises was found locked by the Rent Control Inspector, therefore, it was not possible to ascertain the true nature of the premises. It was the duty of the Rent Control and Eviction Officer to have informed the occupant or sitting tenant as contemplated under Rule 8(2). Rule 8(2) is quoted below:

"The inspection of the building, so far as possible, shall be made in the presence of the landlord and the tenant or any other occupant. The facts mentioned in the report should wherever practicable, be elicited from at least two respectable persons in locality and the conclusion of the inspection report shall be pasted on the notice board of the office of the District Magistrate for the information of the general public, and an order of allotment may be passed not before the expiration of three days from the date of such pasting, and if in the meantime any objection is received, no before the disposal of such objection."

However, subsequently the premises was inspected on 23.10.1986 and the Rent Control Inspector bound as under:

पहले इस भवन में प्रभावती एवं श्री बसन्त लाल का कब्जा था तीन साल पूर्व श्रीमती प्रभावती का निधन हो चुका है तब से श्री बसन्त लाल मै0 महेन्द्रा

इन्जीनियरिंग क0 11 चकराता रोड के नाम से इस दुकान में व्यापार कर रहें है और वर्तमान में भवन का कब्जा उन्ही के पास है

Section 12 of U.P. Act No. XIII of 1972 provides the deeming clause in respect of the following conditions:

(a) he has substantially removed his effects therefrom, or

(b) he has allowed it to be occupied by any person who is not a member of his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

Sub Section (3) contains a proviso for acquiring a residential accommodation in the case of a residential building occupied by the tenant. The same is quoted below:

In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy:

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

Sub clause (4) deals with the deeming provisions as under:

Any building or part which a landlord or tenant has ceased to occupy within the meaning of sub-section (1) or Sub-section

(2), Sub section (3), sub Section (3-A) or sub section (3-B) shall, for the purpose of this Chapter, be deemed to be vacant.

Admittedly in the present case sub clause (3) of Section 12 will not apply, as according to the landlord it was a building where the petitioner is carrying on the business in the name of Mahendra Engineer Co. from the time of his father and as such section 12 (3) has no application in the present case and vacancy has been illegally declared.

However, Rule 2 of U.P. Act 13 of 1972 defines the business as under:

(b) "business" means any profession, trade or calling.

In the counter affidavit filed before this High Court it was admitted as under:

"That the contents of paragraph no.3 of the writ petition are misleading. Although the petitioner was residing in the house but he was using the same for non residential purposes also but it will not change the nature of case."

The Rent Control and Eviction Officer has observed that the Rent receipts on the record right from 11.6.49 has been issued in the name of Mahendra Engineering Co. The assertions are quoted below:

किराये की रसीदें दिनांक 11.6.49 से दिनांक 27.1.64 तक 16 रसीदें दाखिल की हैं तथा इस बिन्दु को उठाया है कि किरायेदारी का उददेश्य बनवाली है किम किराये की रसीदें में महेन्द्रा इंजीनियरिंग क0 के नाम से जारी है।

The word business has also been defined in the Law Lexicon as under:

The expression business was to be equated not with the commercial activity but with the production activity carried on and the production until situated there.

The word business has been defined in the case of Dr. Bashir Uddin vs. District Judge, Bulandshahar and others, AIR 1978 SC 978 as under.

"The word business has not been defined in the Act and is not a word of art. It is a capable of being construed in a comprehensive as weel as a restricted sense, depending on the context in which it occurs. According to the Webster's New Twentieth Century Dictionary, 'business' mean employment; occupation; profession; calling vocation; means of livelihood that which occupies the time, attention and labour of men, for the purpose of profit or improvement. According to the same Dictionary, the worked 'may also, mean commerce or trade in general'. In Coirpus Juris Secondum Volume 12 page 762, the word ';business' in its broader sense is defnined as follows:

In its broad, its broader, or in its broadest, sense, in its more general or common use, in its primary meaning, or when used colloquially, the word 'business' carries with it a very broad meaning; and it has been said that it donotes not only all gainful occupations, but all occupation or duties in which men engage…… has common and general application to all sorts of enterprises which engage people's attention and energies; and includes nearly all the affairs in which either an individual or a corporation can be actors; and is a word in common use to describe every occupation in which men engage……..the word

is commonly employed in connection with an occupation for livelihood or profit but it is no limited to such pursuits, for it has been said that the definition of 'business' by the lexicographers is sufficiently broad and comprehensive to embrace every employment or occupation.……."

According to Aiyar's Law Lexican of Britisa India (1940 Edition) page 164, the word 'business' in its larger sense has been stated to mean 'an affair requiring attention and care; that which business and occupies one's time, attention, and labour as his chief concern'. In the same passage the word 'business' is mentioned as conveying in the narrower sense, 'mercantile pursuits; that which one does for a livelihood' occupation; employment; as, the business of a merchant; the business of agriculture'. It is a well established rule of interpretation that in order to find out the true import of enacted words one must look both at the words as well as the object of the legislation.

Similarly, in re Williams Will Trusts Chartered Bank of India, Australia and China vs. Williams and others 1973 Rent Control Reporter 675, the Court was called upon to determine as to whether the word 'business' included the medical profession. It was held by Dancrwerts, J. that the meaning of the word 'business' seems to me to be plain; on the meaning attributed to it in the dictionaries and in the authorities, the word 'business' is capable of including the practice of a profession."

From the application filed earlier by the previous landlord under Section 21 (1)(a) of the Act, earlier there was clear admission from the inspection, from the admission, from the

counter affidavit and from the rent receipts it is evident that the premises was given for non-residential purpose and the dominant purpose was also non-residential.

As will appear from sub section (3) of Section 12 of the Act, that it applied to a building let out for residential purpose. Therefore, it is well established that the provisions of statute has to complied with the manner in which the legislature has intended. It is well settled that if a statute provides a thing done in a particular manner, the procedure has to be followed according to the statute.

The Apex Court in the case of Chandra Kishor Jha vs. Mahabir Prasad and others (1999) 8 SCC 266, observed as under:

"It is well settled salutary principle that if a statute provides for a thing to be done in a particular manner then it has to be done in that manner and in no other manner (See with advantage: Nazir Ahmad vs. King Emperor, AIR 1936 PC 253 (II) Rao Shiv Bahadur Singh vs. State of U.P. (AIR 1954 PV 322; 1954 SCR 1098; State of U.P. vs. Singhara Singh (AIR 1964 SC 358 (1964) 1 SCWR 57).

In the State of Uttar Pradesh vs. Singhara Singh and others report in AIR 1964 SC 358 (V 51 C 45), the Apex Court has relied upon the English case Law of Taylor vs. Taylor and has observed as under:

"The rule adopted in Taylor vs. Taylor (1878) 1 Ch.D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed."

The Hon'ble Supreme Court in the case of Dhanjaya Reddy vs. State of Karnataka (2001) 4 S.C.C. 9 took the same view that where law requires a thing to be done in a certain manner, it has to be done in that manner or not at all. The Court further observed that the power must be exercised in the manner provided by the statute.

Considering from the point of view of dominant user and purpose of the tenancy it is necessary to consider the scope of dominant purpose in the context of the present case. In AIR 1968 SC 438, Miss S. Snayal vs. Gian Chand, the Apex Court has considered the provisions of section 13 (a)(e) of the Delhi and Ajmer Rent Control Act. Section 13(1)(e) is similar to sub clause (3) of section 12. The Apex Court has observed as under:

"If in respect of premises originally let for residential purposes a decree in ejectment cannot be passed on the grounds mentioned in Section 13(1) (e), if subsequent to the letting, with the consent of the landlord the premises are used both for residential and non-residential purposes, the bar against the jurisdiction of the court would be more effective when the original letting was for purposes-non-residential as well as residential. It may be recalled that the condition of the applicability of Section 13 (1) (e) of the Act is letting of the premises for residential purposes.

In this case the letting not being solely for residential purposes, in our judgment, the Court had no jurisdiction to pass the order appealed from."

The dominant purpose, therefore, being non-residential deeming clause, therefore, as contained under section 12 (3) as well as sub section (4) will not apply in the present case.

Similar view has been taken in the case of Smt. Kanti Khare (supra) to the following effect:

"Section 12 (3) could apply only to a case of residential and not non-residential."

In the case of Smt. Kanti Khare vs. III Addl. District Judge, 1982 A.R.C. 594, the Division Bench of Allahabad High Court has held as under:

"If the premises to which Section 12(3) is sought to be applied is dominantly used for non-residential purpose, it is unreasonable to hold that the tenant has ceased to occupy the same."

In *Nilesh Nandkumar Shah vs. Sikandar Aziz Patel AIR 2002 SC 3073,* their Lordships of Hon'ble Supreme Court has held that it is not permissible for the Court to split up a contract of tenancy in an eviction proceedings. It was further held that the purpose of rent control legislation is to protect the tenants from unjust evictions at the hands of greedy or unscrupulous landlords. Their Lordships have also held that even one portion enjoys protection of the Act, the tenant cannot be evicted from other part of the premises if part of the premises protected by the Act as the contract of tenancy is one single indivisible.

In the case *Shabir Ahmad vs. Sham Lal and another, AIR 2002 SC 1036,* the matter came up for consideration where shop

cum flat was let out and the question was for consideration as to whether residential or non-residential building. The observations are quoted below:

"The said expression is not defined in the Act. It is not a technical expression and not a term of art; so it has to be understood in its popular sense, that is, as commonly understood. In that sense it is capable of being understood both as a 'residential' as well as a 'non-residential building. Therefore, the expression shop-cum flat does not always mean that the ground floor of the building is meant for shops and the first and the higher floors are residential accommodation in the building. The correct approach would be to refer to the context in which the expression appears and then construe it.'

The Apex Court further held as under:

The controversy in this case centres round the question, whether the premises is a residential building. The ground floor is admittedly a shop portion. The dispute is about the first floor. If the first floor of the shop – cum-flat is held to be a residential building, the anwe4r to the question must be in the affirmative but if it is held to be non-residential building, the answer should be in the negative. It will be useful to refer to the definition of the expression "residential building" in clause (g) of Section 2 of the Act which reads:

"2(g). "residential building" means any building which is not a non-residential building".

This definition is somewhat circular. It defines the said expression in terms of non-residential building which is defined in clause (d) as follows:

"2 (d). "non-residential building" means a building being used solely for the purpose of business or trade."

It is thus clear that if a building is being used solely for the purpose of business or trade, it is a non-residential building and a building other than a non-residential building is a residential building. In this case the appellant has been using the premises solely for the purpose of running a Hair Dressing Saloon from the inception of the tenancy.…… ……

……

In the popular sense, that is, as commonly understood. In that sense it is capable of being understood both as a 'residential' as well as a 'non-residential' building. Therefore, the expression 'shop cum flat' does not always mean that the ground floor of the building is meant for shops and the first and the higher floors are residential accommodation in the building."

Yet there is another factor, which shows that the dominant purpose of letting was not residential. In writ petition No.1497 of 1978, was decided on December 111, 1979, the judgment of which has been reported in 1980 A.R.C. 207. The premises were required by the landlord for running nursing home. Relying upon the decision of the Apex Court in AIR 1977 SC, Allahabad High Court has observed as under:

"It was also observed in this case that where an accommodation is used partly for one purpose and partly for

another, the dominant purpose for which it is used must be discovered for det4rmining whether it was required for residential purpose or otherwise. The same principle emerges from the Supreme Court decision in Prem Chand vs. District Judge 1977 Alld. R.C. 117 (S.C.) and the decision of this Court in Chunni Lal vs. District Judge. It is obvious that the purpose of Nursing Home is a business purpose and if part of premises occupied by the Nursing Home used for residence of the Staff Nurse attached to the Nursing Home the main and dominant purpose would still remain running of the Nursing Home and, therefore, the business purpose."

Realising the difficulty, the landlord has filed a special leave petition, where a clear admission was made that the premises was let out for non-residential purpose.

At this juncture it is important to note that in view of the admission of the landlord, it becomes obvious that the vacancy proceedings at the instance of a prospective allottee will be nothing but it will be an exercise of approbate and reprobate. The Apex Court has held in the case *R.N. Gosain vs. Yashpal Dhir 1993(1) A.R.C. 1, as under:*

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some

other advantage". See: Verschers Creameries Ltd. vs. Hull and Netherlands Steamsh Co. Ltd; 1921 (2) K.B. 608, at p.612, Scrutton, L.J. According to Halsbury's Laws of England, 4th Edn. Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be preclude3d from saying that it is invalid and asking to set it aside".

From the evidence on the record it is clearly proved that premises no.19/3 Rajpur Road has been shown to be residential building and on the basis of voter list and ration card of house no.19/3 Rajpur Road no inference can be drawn that a deeming clause is attracted as the present premises being non-residential or at least dominant purpose being non-residential. There is no applicability of sub section (3) of Section 12 of the Act.

In order to attract applicability of Section 12 (3), the dominant purpose should be residential alone. Once it has been established that the premises is being used for running business in the name of Mahendra Engineering Co. and receipts were also issued in the name of Mahendra Engineering Co. It is fully established that the dominant purpose was non residential.

It was also argued that Section 12 of the Act provides the vacancy of the part of accommodation. The argument cannot be accepted as no such point was raised at the initial stage. However, the respondents will be at liberty to establish from the already available evidence on the record as to whether the accommodation is separable or not and further whether it will form part of the non-residential premises.

The Rent Act is responsive to urgent social demand. The rent enactment as will appear from the preamble that it is a social legislation. The preamble is quoted below:

An Act to provide, in the interest of the general public, for the regulation of letting, rent and the eviction of tenants from certain classes of buildings situated in Urban areas, and for matters connected therewith.

It may be pointed out that Rent legislation being beneficial legislation as held in the case *Malpe Vishwanath Acharya and others vs. State of Maharashtra and another, (1998) 2 Supreme Court Cases 1*, to the following effect:

"It is true that one of the reasons for enacting the rent control legislation is to prevent exploitation of the tenants by thelandlords. One of the protections which has been provided to the tenant in the rent legislation throughout the country is the concept of standard rent.

…… …….…….…… ……..… ….. …. …..

..In so far as social legislation, like the Rent Control Act is concerned the law must strike a balance between rival interests and it should try to be just to all. The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. When there is shortage of accommodation it is desirable, may, necessary that some protection should be given to the tenant in order to ensure that they are not exploited."

In the background of the entire facts and considering the law as well as the facts on the record it is established that section 12(3), has no application in the present case as it applied only in a purely residential accommodation. The deeming clause therefore is not attracted at all. The purchaser landlord or the predecessor of the landlord has failed to prove the applicability of section 12

(3) of the Act. The rent receipts on the record shows dominant purpose being non residential alone.

Apart from the aforesaid as will appear from the facts on the record that new landlord Manoj Poddar has purchased the accommodation on 26.3.1999 and he is fully unaware regarding purpose for letting out of the accommodation in favour of the predecessor of the petitioner and as such it will be a futile exercise to send back the case to the Rent Control and Eviction Officer for deciding afresh in view of the judgment of the Apex Court in the case of *Ram narain Sharma vs. Shakuntala Gaur, 2002 S.C.F.B.C. 363* it has been held that bonafide requirement cannot be considered in infructuous proceedings of Revision. Release order under section 21 (1)(a) cannot be granted within a period of three years from the purchase. It has been held as under:

"The release application under Section 16 (l)(b) of the Act moved by the Respondent was misconceived. The order passed on the infructuous proceedings namely Revision No.19/90 would be inconsequential and shall not enure any benefit either to Ravi Mohan Bhatnagar who had filed the revision nor to the respondent who moved application for impleadment as a revisionist. Initially also Ravi Mohan Bhatnagar had no justifiable reason to file the revision one having failed to file objections to the allotment application in the year 1990 more particularly on the ground that notice was not served upon some other heirs of late Bankey lal. Whatever right, if at all he had to file the revision as one of the heirs of Bankey Lal, he had lost the

same after the property came to be owned by Hari Mohan Bahtnagar and Mohan Bhatnagar on March 20, 1994 by virtue of arbitration award in their favour. So far respondent is concerned, her impleadment as one of the revisionists rightly or wrongly would also be inconsequential since she had purchased the property from Hari Mohan and Mohan Bhatnagar as the owmers and predecessor-in-interest in the property and not from heirs of late Bankey Lal.……..

…….She could not be permitted to do something indirectly which was impermissible directly in view of the proviso to sub-section (1) of Section 21 of the Act namely, she could not get the premises vacated on the ground of her bona fide requirement within three years of purchasing the property.

In view of the facts and circumstances of the case and from the available evidence on the record it is fully established that the order of vacancy cannot be sustained. Since the filing of the Writ petition property has been transferred and the original petitioner has already expired, it will be just and proper to quash the order of vacancy.

Since the present proceedings have been initiated by the prospective allottee who has not come forward to contest the matter and no counter affidavit has been filed. The counter affidavit has been filed by the purchaser alone and that too admits the averments made by the petitioners regarding user of the non-residential accommodation.

However, it will be open to the parties to demonstrate from the evidence already on the record to show as to whether the

back portion of the premises in residential or non-residential and the same is separable or not. It will be open for the Rent Control and Eviction Officer to adjudicate as to whether it is residential or non-residential accommodation and further it is separable or not.

In view of my findings above there will be no vacancy with regard to the part of the premises occupied by the petitioners for non residential purposes, However so far as back part of the premises is concerned the Rent Control and Eviction Officer shall also record his findings from the already available evidence on the record to the effect as to whether the said part of the premises is necessary for the legitimate and beneficial enjoyment of the non residential part of the tenanted premises before invoking the provisions of section 12 (3) of U.P. Act No.13 of 1972.

With these observations the writ petition is allowed. The order-dated 11.8.1987 passed by the Rent Control and Eviction Officer, Dehradun is quashed.

(Rajesh Tandon, J.)

17.9.2003
Dhyani